

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 22074 of 2017**

SHAILESHKUMAR NAGJIBHAI PANSURIYA....Petitioner(s)

Versus

ELECTION COMMISSION OF INDIA & 2....Respondent(s)

Appearance:

MR BHARAT T RAO, ADVOCATE for the Petitioner(s) No. 1

MR AMIT SHARMA WITH MR. SAHIL M SHAH, ADVOCATE for the Respondent(s) No. 1

MS MEGHA JANI WITH MR. SAHIL M SHAH, ADVOCATE for the Respondent(s) No. 2

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.Y. KOGJE

Date : 12/12/2017

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. This petition is filed for a direction to the Election Commission of India to make it mandatory to count all VVPAT slips alongwith the counting of votes through EVMs in the on-going State Assembly elections. The petitioner is a resident of the State and is concerned about the purity and proper conduct of such elections. His prime concern is that there is clear and distinct possibility of tampering the recording of votes in EVMs. In order to ensure conduct of free and fair elections and to eliminate any such possibility as also to remove any doubts in the minds of public, the Election Commission of India should ensure that all slips secured in the boxes through VVPATs should be

subjected to counting parallelly with the electronic counting through EVMs. In this regard, the petitioner points out that the Election Commission of India has issued a press release dated 20th May, 2017 in which it was declared that:

“The Commission will count VVPAT slips up to a definite percentage, which will be determined by the Commission. The ECI will shortly evolve an appropriate framework in this regard. “

2. The Counsel for the petitioner during the previous hearing on 7th December, 2017 had submitted that if not all the paper slips atleast 25% of the votes should be counted through VVPAT to ensure total transparency. It was also submitted that despite the declaration of Election Commission made in the press release dated 20th May, 2017 no framework for counting a certain percentage of votes through VVPAT was set up. We had while issuing notice to the Election Commission of India on 7th December, 2017 in our order highlighted this aspect.

3. In response to the notice the Election Commission has appeared through legal representatives. We have heard learned Advocates for both the sides. Shri B.T.Rao for the petitioner highlighted that there have been complaints about the functioning of EVMs during the first phase of voting which took place on 9th December, 2017. He submitted that complaints have been received suggesting that the EVMs can be connected to the mobile phones through Bluetooth leaving a possibility of tampering. He pointed out that on 08th December, 2017 the Election Commission of India issued guidelines providing for counting of votes through VVPAT in one booth of every constituency selected on random basis. However, according to the Counsel this would not provide sufficient safeguard against possible tampering and manual counting should be ordered atleast in 25% of the booths of every constituency.

4. On the other hand learned Counsel for the Election Commission of India opposed the petition contending that the Election Commission has taken all possible steps to eliminate any mistake, mischief or foul play during the conduct of elections and at the time of counting of votes. The booth to be selected for manual counting would be on random basis. This would be in addition to the discretionary powers of the Returning Officer to order manual counting in terms of Rule 56D of the Conduct of Election Rules, 1961. The Counsel submitted that similar issues were raised before the Supreme Court in Writ Petition (Civil) No. 983 of 2017. The Supreme Court while disposing of the petition by an order dated 30.10.2017 refused to interfere with the discretionary powers of the Election Commission of India. Counsel pointed out that prior to 8th December, 2017 also the Election Commission of India had taken a conscious decision to order manual counting in one polling station per Assembly Constituency randomly selected which was circulated to the Chief Electoral Officers of the Gujarat and Himachal Pradesh States under a communication dated 11th October, 2017. More detailed guidelines in this respect were issued under further communication dated 13th October, 2017.

5. Having heard the learned Advocates for the parties and having perused the materials on record we may at the outset clarify that we confine our observations and conclusions to the limited purpose of meeting with the petitioner's request for ordering full or atleast substantial percentage of the votes through manual counting during the on-going State Assembly Elections. We do not involve ourselves in the larger issues and controversies for the simple reason that this petition has been filed at a somewhat belated stage where the election machinery in the State was in full swing and the first available opportunity for the Court to peruse and examine the grievances of the petitioner arose on 7th December, 2017 when the first phase of polling in

the State was scheduled on 09th December, 2017. Even otherwise, an issue as serious and sensible as this cannot be summarily and permanently closed.

6. With these preliminary comments we may recall that the system of Voter Verifiable Paper Audit Trail now deployed by the Election Commission of India in the State elections for all polling stations in every constituency, would trace its genesis to the judgment of the Supreme Court in the case of ***Subramaniam Swamy v. Election Commission of India*** reported in (2013) 10 Supreme Court Cases 500. In the said judgment the Court had made following concluding remarks:

“27. Though initially ECI was a little reluctant in introducing the “paper trail” by use of VVPAT, taking note of the advantage in the system as demonstrated by Dr. Subramaniam Swamy, we issued several directions to ECI. Pursuant to the same, ECI contacted several expert bodies, technical advisers, etc. They also had various meetings with the national and State level political parties, demonstrations were conducted at various places and finally after a thorough examination and full discussion, VVPAT was used successfully in all the 21 polling stations of 51 Noksen (ST) Assembly Constituency of Nagaland. The information furnished by ECI, through the affidavit dated 1-10-2013, clearly shows that VVPAT system is a successful one. We have already highlighted that VVPAT is a system of printing paper trail when the voter casts his vote, in addition to the electronic record of the ballot, for the purpose of verification of his choice of candidate and also for manual counting of votes in case of dispute.

28. From the materials placed by both the sides, we are satisfied that the “paper trail” is an indispensable requirement of free and fair elections. The confidence of the voters in the EVMs can be achieved only with the introduction of the “paper trail”. EVMs with VVPAT system can ensure the accuracy of the voting system. With an intent to have fullest transparency in the

system and to restore the confidence of the voters, it is necessary to set up EVMs with VVPAT system because vote is nothing but an act of expression which has immense importance in a democratic system.

29. In the light of the above discussion and taking notice of the pragmatic and reasonable approach of the ECI and considering the fact that in general elections all over India, ECI has to handle one million (ten lakh) polling booths, we permit ECI to introduce VVPAT in gradual stages or geographical wise in the ensuing general elections. The area, State or actual booth(s) are to be decided by ECI and ECI is free to implement the same in a phased manner. We appreciate the efforts and good gesture made by ECI in introducing the same. For implementation of such a system (VVPAT) in a phased manner, the Government of India is directed to provide required financial assistance for procurement of units of VVPAT.”

7. In tune with the decision of the Supreme Court in case of **Subramaniam Swamy (supra)** the Election Commission of India would provide 100% paper-trail through VVPATs on the on-going State elections. In this regard in the press release dated 20th May, 2017, as noted earlier, the Election Commission of India had declared that the Commission would count VVPAT slips up to a definite percentage, which will be determined by the Commission and an appropriate framework in this regard would be evolved by the Commission shortly. The Election Commission of India had there upon issued a communication to the Chief Election Officers of Gujarat and Himachal Pradesh on 11th October, 2017 which reads as under:

“I am directed to intimate that the Commission has directed that in the forthcoming General Election to State Legislative Assemblies of Gujarat and Himachal Pradesh, mandatory verification of VVPAT paper slips of randomly selected 01(one) polling station per Assembly Constituency shall be done on a ‘pilot basis’. The above mandatory verification of VVPAT paper slips of 01(one) polling station (randomly selected) will be in

addition to the provisions of Rule 56D of the Conduct of Election Rules, 1961.

Detailed instructions for this purpose will be issued separately.

The above direction of the Commission shall be brought to the notice of all concerned.”

8. Further detailed guidelines in this regard were issued under the communication dated 13th October, 2017 which further provided as under :

“For this ‘pilot’ verification of VVPAT paper slips of randomly selected 01(one) polling station per Assembly Constituency, the following procedure shall be followed:

1. The verification of VVPAT paper slips of randomly selected 01(one) polling station for each Assembly Constituency shall be taken up after the completion of the last round of counting of votes recorded in the EVMs.

2. The random selection of 01(one) polling station per Assembly Constituency shall be done by Draw of lots, by the Returning Officer concerned, in the presence of candidates/ their agents and the General Observer appointed by the Commission for that Assembly Constituency.

3. The draw of lots must be conducted immediately after the completion of the last round counting of votes recorded in the EVMs (Control Units) in the designated counting hall for the particular Assembly Constituency.

4. A written intimation regarding the conduct of draw of lots for the random selection of 01(one) polling station for verification of VVPAT Slips shall be given by the Returning Officer to the Candidates/their election agents well in advance.

5. The following procedure shall be followed for the conduct of draw of lots:

- (a) White colour paper cards of postcard size shall be used for conducting the draw of lots.
- (b) Total number of such paper cards should be equal to the total number of polling stations in the Assembly Constituency.
- (c) The paper cards shall have pre-printed Assembly Constituency number, AC name and date of polling on the top, and the polling station number in the centre. Each digit of the polling station number shall be at least 1" * 1" (1 inch by 1 inch) size and printed in black ink.
- (d) The paper cards to be used for draw of lots should be four-folded in such a way that polling station number is not visible.
- (e) Each paper card shall be shown to the candidate/their agents before folding and dropping in the container.
- (f) The paper cards shall be kept in the big container and must be shaken before picking up 01(one) slip by the Returning Officer.

6. The verification of VVPAT paper slips shall be done in a 'VVPAT Counting Booth' (VCB) specially prepared for this purpose inside the Counting Hall. The booth shall be enclosed in a wire mesh just like a bank cashier's cabin so that no VVPAT paper slip can be accessed by any unauthorized person. One of the Counting tables in the Counting Hall can be converted into the VCB and can be used for normal counting of round-wise EVM Votes before the count of VVPAT slips as per random selection after the completion of round-wise EVM counting.

7. The verification count of the VVPAT paper slips of the randomly selected 01(one) polling station shall be conducted strictly in accordance with the instructions of the Commission on counting of printed paper slips.

8. The Returning Officer shall personally supervise the counting VVPAT paper slips at this booth. The General Observer concerned shall ensure close and careful observation of the entire exercise and ensure strict compliance of the Commission's instructions.

9. The above process shall be fully videographed.

10. After completion of the above process, the Returning Officer shall give a certificate in the annexed format.

The above direction of the Commission shall be brought to the notice of all concerned.”

9. Few things emerge from these communications dated 11th October, 2017 and 13th October, 2017 of the Election Commission of India. First is that on random basis one polling station per Assembly constituency would be selected in which there would be manual counting of votes on the basis of paper slips generated through VVPAT. This would be in addition to the provisions contained in Rule 56D of the Conduct of Election Rules, 1961. The random selection of the polling station for such counting would be done through draw of lots by the Returning Officer in presence of the candidates or their agents and the observers appointed by the Commission. Such lots would be drawn immediately after completion of the last round of counting of votes recorded in the EVMs. Detailed procedure for drawing of lots has also been laid down. The counting paper slips of the VVPATs shall be done in the manner specified. The Returning Officer would personally supervise counting process. The entire process would be videographed. After completion of the process the Returning Officer would give a certificate in a prescribed format which contains necessary details such as number of votes cast as per the EVM, those cast as per the paper slips and discrepancies between the two, if any.

10. Thus the guidelines issued by the Election Commission of India through its latest circular dated 08th December, 2017 are at its best and in addition and in reiteration of its earlier decision circulated through communications dated 11th October, 2017 and 13th October, 2017. The procedure laid down through these communications would ensure

random selection of one polling station per Assembly constituency where the paper slips of VVPAT would be counted and the tally would be matched with the EVM counting. The detailed guidelines would ensure the random selection of the polling station as well as orderly counting of paper slips in presence of the Returning Officer himself, which process would be videographed.

11. This entire procedure would be in addition to the powers of the Returning Officer under Rule 56D of the Conduct of Elections Rules, 1961 which reads as under:

“56D Security of paper trail:-

(1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.

(2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.

(3) Every decision of the returning officer under sub-rule(2) shall be in writing and shall contain the reasons therefor.

(4) If the returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall

- (a) do the counting in the manner as may be directed by the Election Commission;
- (b) If there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in Form 20 as per the paper slips count;
- (c) announce the amendments so made by him; and
- (d) complete and sign the result sheet.”

12. Perusal of this Rule would show that in case where the printed paper trail is maintained by the Election Commission during the election the candidate or his election agent or counting agent can apply to the Returning Officer to count the printed paper slips in respect of any polling station or stations under sub-rule (2) or Rule 56D. Upon such application being made the Retuning Officer would decide the matter and may allow the application in whole or in part or reject it if it appears to him to be frivolous or unreasonable. Sub-rule (3) or Rule 56D requires that such decision of the Returning Officer would be in writing and contain reasons. Under sub-rule (4) of Rule 56D the conclusions of the Returning Officer granting the request for counting of paper slips are specified. From the materials on record thus it emerges that the guidelines for mandatory counting of paper slips in one polling station per Assembly constituency is in addition to the powers of the Returning Officer under Rule 56D to accept the request of a candidate for counting all the paper slips in as many polling stations as the case for such counting is made out.

13. The mandatory counting of paper slips of a randomly selected polling station is to ensure demonstration of transparency and purity of the conduct of elections even in absence of any complaint or discrepancy being reported whereas Rule 56D would operate in a field where a candidate, his election agent or polling agent satisfies the Returning Officer that the need for counting of paper trail has arisen in one or more polling stations. Specific cases of genuine complaints can be addressed by the Returning officer through exercise of the powers under Rule 56D of the Conduct of Election Rules,1961. There is no further requirement for enlarging the scope for mandatory counting of paper slips in addition to what the Election Commission in its discretionary powers has specified. Quite apart from the basic

responsibility of conduct of free and fair elections resting with the Election Commission of India with matching powers and duties, the issue was also presented before the Supreme Court in Writ Petition No. 983 of 2017 where the prayers of the petition was as under:

“Issue an appropriate writ, order or direction the respondent to frame appropriate rules, regulations and guidelines for counting through VVPAT paper trails; “

14. In this respect while disposing of the Writ Petition by order dated 30th October, 2017 the Supreme Court had made following observations:

“As far as Prayer (b) is concerned, it is urged by Mr.K.K.Venugopal that guidelines have already been brought by the Election Commission of India. The same is disputed by Mr.Kapil Sibal and Mr.Vivek Tankha, learned senior counsel appearing for the petitioner. We leave it to the discretion of the Election Commission of India, as we are not inclined to enter into the said arena.”

15. In view of the above discussion no direction as prayed for by the petitioner can be granted. Before closing we may observe that there is nothing on record to suggest that the decision of Election Commission of India to go for mandatory counting of paper slips in one polling station in every constituency in any manner, limits or restricts the discretionary powers of the Election Commission of India to enlarge the scope of such manual counting. We are sure and we hope that such a situation does not arise but in the unlikely scenario of discrepancies being reported in number of polling stations which have been subjected to such manual counting it is always open for and the Election Commission will consider manual counting in larger number of polling stations as may be advised.

With these observations the petition stands disposed of.

(AKIL KURESHI, J.)

(A.Y. KOGJE, J.)

SINDHU NAIR

